UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELISABETH VON ZEMENSZKY, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	)	DOCKET NUMBER PH-0351-98-0078-I-1 DATE:February 2 1999

Adam H. Feinstein, Esquire, Philadelphia, Pennsylvania, for the appellant.

Jerome T. Dempsey, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

An administrative judge of the Board's Northeastern Regional Office issued a February 27, 1998 order staying further proceedings in the appellant's reduction in force (RIF) separation appeal. On the agency's motion, the administrative judge certified for immediate review by the Board under 5 C.F.R. § 1201.93 the issue of the Board's jurisdiction over an appeal by an employee appointed under 38 U.S.C. § 7401(1) who is separated pursuant to a "staff adjustment." For the

reasons discussed below, we VACATE the stay order and RETURN the appeal to the regional office for further proceedings.

BACKGROUND

The facts in this appeal, as currently developed, are essentially undisputed. On August 28, 1988, the appellant received an excepted service appointment to the position of Physician in the agency's Veterans Health Administration (VHA) under 38 U.S.C. § 4104(1) (redesignated 38 U.S.C. § 7401(1) effective May 7, 1991, pursuant to the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Act of 1991), Pub. L. No. 102-40, 105 Stat. 210), and was employed at the agency's Medical Center in Coatesville, Pennsylvania. Initial Appeal File (IAF), Tabs 4, 8. On June 30, 1997, the agency's Coatesville Medical Center Director issued the appellant a "Specific Advance Notice of Staff Adjustment," informing her that, because of "a reduction in the projected level of resources available to support the [agency's] Coatesville Center activities," her position had "been determined to be in excess of local needs" and she would be separated effective September 2, 1997. IAF, Tab 3, subtab D. The appellant timely filed a formal grievance of her proposed separation, which the Coatesville Medical Center Director denied on August 18, 1997. *Id.* Effective September 2, 1997, the agency separated the appellant from her Physician position "due to staffing adjustment." IAF, Tab 3, subtab B, and Tabs 4, 8.

On November 10, 1997, the appellant, by her designated counsel, filed a petition for appeal with the Board asserting that she had been separated by a RIF in violation of the agency's regulations and her rights to due process. She requested a hearing in her appeal. IAF, Tab 1. The administrative judge issued an acknowledgment order that, inter alia, stated that the appellant appeared to be a Title 38 employee and that the Board may not have jurisdiction over her appeal and ordered her to file evidence and argument to prove that her appeal is within the Board's jurisdiction. IAF, Tab 2. The appellant timely responded, asserting

that employees appointed under 38 U.S.C. § 7401(1) are not barred under the provisions of Title 38 from appealing a RIF separation to the Board and that good cause exists for the untimely filing of her appeal. IAF, Tab 3. The agency responded to the appeal and moved that the appeal be dismissed for lack of jurisdiction and as untimely filed. IAF, Tab 4. The appellant submitted additional argument on the jurisdictional issue and a motion for waiver of the time limit for filing her appeal supported by her affidavit. IAF, Tab 5.

The administrative judge issued a February 11, 1998 order finding that the appellant was separated due to a "staff adjustment," i.e., a RIF, not a "major adverse action" or an action that arose out of "a question of [her] professional conduct or competence," and therefore 38 U.S.C. § 7462 is inapplicable to foreclose Board jurisdiction. IAF, Tab 6. The administrative judge also found that, although Congress in enacting 38 U.S.C. § 7463 specifically provided that an employee appointed under 38 U.S.C. § 7401(1) is entitled to a grievance procedure in other adverse actions that are *not* a major adverse action or *do not* arise out of a question of professional conduct or competence, Congress did not provide in that section that the reviewing official's decision on the grievance shall be final. *Id.* Further finding that there is nothing in the plain language of the appointing statute, 38 U.S.C. § 7401(1), or in the list of the provisions of law set forth in 38 U.S.C. § 7425(a) that employees appointed under section 7401(1) are not subject to, that could be read to authorize the agency to disregard the provisions of 5 U.S.C. §§ 3501-04 pertaining to the retention preference of competing employees who are released in a RIF, the administrative judge concluded that the Board has jurisdiction over the appellant's appeal. *Id.* The administrative judge also found that the appellant had shown good cause to waive the Board's regulatory time limit for filing her appeal. *Id.*

The agency responded in opposition to the administrative judge's jurisdictional determination, IAF, Tab 8, and filed a motion for certification of an

interlocutory appeal to the Board of the administrative judge's jurisdictional order, IAF, Tab 9. The appellant responded in opposition to the agency's motion. IAF, Tab 10. The administrative judge, staying further proceedings in this appeal pending the Board's ruling, granted the agency's motion and certified his jurisdictional determination to the Board for an immediate ruling. IAF, Tab 11.

Subsequently, the attorneys representing the appellants in two other Board appeals of their asserted RIF separations from their Certified Registered Nurse Anesthetists positions at the agency's Medical Center in Reno, Nevada, filed a motion requesting an opportunity to submit argument concerning the jurisdictional issue that is the basis for this interlocutory appeal. IAF, Tab 12. On May 12, 1998, the Clerk of the Board granted the motion and afforded the attorneys until June 10, 1998 to submit any jurisdictional argument, and afforded the parties to this appeal until June 30, 1998, to file a response to such argument. IAF, Tab 13.

The attorneys for the appellants in the two other Board appeals timely filed their jurisdictional argument. IAF, Tab 15. Further, two attorneys representing, respectively, the National Employment Lawyers Association and another Physician in a separate Board appeal of her asserted RIF separation from the agency at a medical facility in California, filed a motion to, inter alia, file amicus curiae briefs. IAF, Tab 14. The Clerk granted the motion over the agency's objection, IAF, Tabs 21-22, and the two attorneys have timely filed separate briefs on the jurisdictional issue in this appeal, IAF, Tabs 17-19. The agency has also timely submitted additional legal argument on the jurisdictional issue. IAF, Tab 16. The appellant has timely submitted a response to the amicus briefs and the agency's additional legal argument. IAF, Tab 24. Finally, the agency has submitted responses to the amicus comments. IAF, Tabs 25-26. The Board has considered all of these additional legal arguments submitted in deciding this interlocutory appeal.

ANALYSIS

The appellant asserts that her appeal is within the jurisdiction of the Board as an appeal of a RIF separation. For the reasons below, we agree.

I. The clear language of the statutory and regulatory provisions governing RIFs indicates that the appellant is subject to those provisions and has the right to appeal her RIF separation to the Board.

We examine first the relevant statutory provisions governing RIFs. The law governing RIFs is grounded in the Veterans' Preference Act of 1944 (Veterans' Preference Act), Pub. L. No. 359, ch. 287, § 12, 58 Stat. 390. Congress mandated in the Veterans' Preference Act, inter alia, that "*[i]n any reduction in personnel in any civilian service of any Federal agency*, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." *Id.* (emphasis supplied). This portion of the Veterans' Preference Act has remained unchanged in substance since its enactment more than 50 years ago. *See* 5 U.S.C. § 3502(a); *Grier v. Department of Health & Human Services*, 750 F.2d 944, 946 (Fed. Cir. 1984). The current version of the Veterans' Preference Act that pertains to RIFs is codified in subchapter I of chapter 35 of Title 5, 5 U.S.C. §§ 3501-04.

The law governing RIFs, in 5 U.S.C. § 3501(b), expressly provides that, "[e]xcept as otherwise provided by this subsection ... *this subchapter [I] applies to each employee in or under an Executive agency*." (Emphasis supplied.) The agency in this appeal, "The Department of Veterans Affairs," is specifically named by statute as an "Executive agency." 5 U.S.C. §§ 101, 105. Thus, it would appear from the clear language of these statutes that all employees of the agency are subject to the Title 5 statutes that govern RIFs.

Precedent of the U.S. Court of Appeals for the Federal Circuit supports this construction of the statutory provisions involving RIFs. The court has found in

reviewing the Board's final decision affirming the RIF separation of a preference eligible excepted service employee of the Tennessee Valley Authority (TVA) that, although the TVA is a government corporation authorized by statute to appoint TVA employees "without regard to the civil service laws," the TVA is also an agency in the Executive branch under 5 U.S.C. § 105. *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985). Thus, the court determined that the employee, as a preference eligible employee within the meaning of the Veterans' Preference Act and as an "employee in or under an Executive agency," 5 U.S.C. § 3501(b), was entitled to retention preference rights under 5 U.S.C. § 3502(c). *Id.* at 1040-41. The court affirmed the Board's final decision, holding that the TVA did not violate those statutory rights in the employee's RIF separation appeal. *Id.* at 1040-42. Consequently, it would appear from the construction of the clear language of 5 U.S.C. §§ 101, 105, and 3501(b) that Congress has spoken directly to the question of whether all employees appointed by the agency are subject to the Title 5 statutes that govern RIFs.

The Office of Personnel Management (OPM) has promulgated regulations at 5 C.F.R. part 351 to carry out the basic RIF principles set forth in 5 U.S.C. § 3502. *See Kohfield v. Department of the Navy*, 75 M.S.P.R. 1, 4 (1997). Under 5 C.F.R. § 351.201(a)(2), "[e]ach agency" is required to follow OPM's RIF regulations "when it releases a competing employee from his or her competitive level by ... separation ... when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; [or] reorganization ... ." The appellant's separation pursuant to a "staff adjustment" necessitated "by a reduction in the projected level of resources" constitutes the kind of action that is covered by the regulations. Further, with exceptions that are not relevant here, section 351.201(a)(2) covers "each civilian employee in ... [t]he executive branch

of the Federal Government." 5 C.F.R. § 351.202(a)(1).[1] The appellant falls within the coverage of the regulations. Finally, an employee covered by the RIF regulations at part 351, and who has been separated by RIF, is entitled to appeal the separation to the Board. *See* 5 C.F.R. § 351.901. In sum, OPM's regulations on their face apply to the appellant's separation and give her the right to appeal to the Board.

II. The Title 38 statutory provisions governing employees of the agency's Veterans Health Administration do not foreclose the Board's exercise of RIF jurisdiction over this appeal.

We now turn to the provisions of Title 38 that are at issue in this appeal.[2]

A. The agency's authority to prescribe "conditions of employment" for health-care professionals does not encompass the authority to prescribe RIF rules independent of Title 5 statutes and regulations.

In 1946, Congress enacted Veterans' Administration, Department of Medicine and Surgery, Pub. L. No. 293, 59 Stat. 675, creating what is now the agency's VHA. As now codified and amended, section 7421 of Title 38 restates the substance of the original 1946 enactment, in relevant part:

> (a) Notwithstanding any law, Executive order, or regulation, the Secretary [of Veterans Affairs (Secretary)] shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter

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[1] The only employees expressly excluded from the coverage of 5 C.F.R. part 351 are Senior Executives and those whose appointments require confirmation by, or the advice and consent of, the Senate. *See* 5 C.F.R. § 351.202(b).

[2] The Act of 1991 revised and redesignated sections 4101 through 4119 of chapter 73 of Title 38 as various sections of the new chapter 74 of Title 38. *See* 105 Stat. 221; *Cochran v. Department of Veterans Affairs*, 67 M.S.P.R. 167, 169 (1995). Thus, we will apply the provisions of the revised Title 38 to this appeal, which concerns actions taken after 1991. *See Cochran*, 67 M.S.P.R. at 169.

> [chapter 74] in positions in the Veterans Health Administration listed in subsection (b).
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> (b) Subsection (a) refers to the following positions:
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> (1) Physicians.
> (2) Dentists.
> (3) Podiatrists.
> (4) Optometrists.
> (5) Registered nurses.
> (6) Physician assistants.
> (7) Expanded-duty dental auxiliaries.

See Pub. L. No. 79-293, § 7(b), 59 Stat. 677 (codified as amended at 38 U.S.C. § 7421).

The agency contends that section 7421(a) permits it to construct its own system for "staff adjustments" for VHA health-care professionals outside of the relevant Title 5 statutes and regulations. Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the agency contends that the Board should defer to its interpretation of section 7421(a). *See* IAF, Tab 16, Agency Supplemental Argument at 27-31; *see also* IAF, Tabs 8-9.

The starting point of every case involving statutory construction is the language of the statute itself. *Hargrove v. Department of Defense*, 77 M.S.P.R. 266, 270 (1998); *Brown v. Office of Personnel Management*, 65 M.S.P.R. 380, 383 (1994). Where the statutory language is clear, it must control, absent a clearly expressed legislative intent to the contrary. *Hargrove*, 77 M.S.P.R. at 270; *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). If a statute is ambiguous, a reasonable interpretation by the agency charged with its administration is entitled to deference. *Chevron*, 467 U.S. at 843-44 (1984); *De Jesus v. Office of Personnel Management*, 63 M.S.P.R. 586, 592 (1994), *aff'd*, 62 F.3d 1431 (Fed. Cir. 1995) (Table).

The agency's authority to prescribe the "conditions of employment" for VHA health-care professionals could be interpreted to encompass the authority to devise a system for retention and release during "staff adjustments," if the term "conditions of employment" is read broadly and in isolation. That term appears between the terms "hours" and "leaves of absence," however, suggesting that Congress may have intended something less far-reaching, relating merely to scheduling and tours of duty. The federal courts of appeals have reviewed the legislative history relating to this provision and have found that it is sparse, containing mere paraphrases of the statutory language in the House and Senate reports and a single reference in House debate. *E.g., American Federation of Government Employees v. Federal Labor Relations Authority*, 930 F.2d 1315, 1326 n.15 (8th Cir. 1991); *Colorado Nurses Association v. Federal Labor Relations Authority*, 851 F.2d 1486, 1489-90 (D.C. Cir. 1988). The reference in the House debate states in relevant part:

> [W]e know that people do not get sick by the clock. We found that in many of these hospitals under civil-service regulations and under the wage-hour law and other regulations doctors practice 40 hours a week.... [I]f [the doctors] had worked a few minutes overtime, compensatory time would have had to be given them, and it would have taken a great deal of complicated figuring and bookkeeping to straighten it out. In section [7421] we provided that notwithstanding any law, Executive order, or regulation, the [Secretary] shall prescribe by regulation the hours and conditions of employment and leaves of absence of doctors, dentists and nurses.

91 Cong. Rec. 11,662-63 (1945) (Rep. Scrivner); *see American Federation of Government Employees*, 930 F.2d at 1326 n.15; *Colorado Nurses Association*, 851 F.2d at 1489-90. This passage supports a limited reading of the term "conditions of employment," rather than the broad reading urged by the agency.

We acknowledge that one court has found that section 7421(a) is "an integral part of an *independent* personnel system that Congress has placed under the direct control of the Secretary." *Colorado Nurses Association*, 851 F.2d at

1489 (emphasis supplied). The specific question before that court, however, was whether the agency had a duty to bargain over "conditions of employment" with VHA health-care professionals under the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7102; the court held that the agency had no such duty, given the Secretary's authority to prescribe "conditions of employment" under 38 U.S.C. § 7421(a) (codified at the time of the court's decision at 38 U.S.C. § 4108). *See also National Federation of Federal Employees v. Federal Labor Relations Authority*, 73 F.3d 390, 395 (D.C. Cir. 1996) (under 38 U.S.C. § 7421(a), the Secretary exercises complete discretion over the conditions of employment of the agency's medical personnel, including peer review procedures for Registered Nurses appointed under section 7401(1); hence, the Secretary need not engage in collective bargaining with regard to such conditions); *American Federation of Government Employees*, 930 F.2d at 1325-27 (the agency did not have a duty to bargain with the union representing Nurses employed at an agency hospital over working conditions because Title 38 granted the Secretary authority to prescribe the working conditions of health-care professionals employed by the agency). The courts have not considered whether the agency has the authority it claims in this appeal to establish, independent of the RIF statutes and regulations, a manner by which the agency may release health-care professionals appointed under 38 U.S.C. § 7401(1) after the agency decides to eliminate positions.

Apart from the absence of any definitive judicial interpretation of 38 U.S.C. § 7421(a) in the RIF context, the agency has not shown that it has consistently and over a long period interpreted section 7421(a) as authorizing it to construct its own RIF system. *See United States v. Clark*, 454 U.S. 555, 564-65 (1982) (where an administrative interpretation of a statute is consistent and longstanding, it is particularly worthy of deference); *accord De Jesus*, 63 M.S.P.R. at 592. The relevant copies of the agency's regulations and directives pertaining to "staff adjustments" that it has submitted date only from March 11, 1996. Thus, they do

not establish that the agency's administrative interpretation of 38 U.S.C. § 7421(a) as permitting it to construct its own Veterans Health Administration system governing "staff adjustments" outside of 5 U.S.C. §§ 3501-04 and 5 C.F.R. part 351 is "consistent and longstanding." *See De Jesus,* 63 M.S.P.R. at 592-93.

In this regard, the agency contends that it has promulgated regulations governing "staff adjustments," VHA Handbook 5111 (Mar. 11, 1996), established pursuant to VA Directive 5111 (Mar. 11, 1996), which it applied in this appeal to separate the appellant. *See* IAF, Tabs 8, 9, 16. The agency has submitted copies of its March 11, 1996 Handbook and Directive into the record. *See* IAF, Tab 9, Tab 16, attachment A. The agency's VA Directive 5111 states that the Handbook rescinds "Change 2, VA Personnel Policy Manual MP-5, Part II, chapter 11, January 24, 1992." IAF, Tab 16, attachment A, VA Directive 5111 at 1. The agency has also submitted into the record a copy of the rest of its VA Personnel Policy Manual MP-5, Part II (July 28, 1977, as amended). IAF, Tab 16, attachment C. However, the agency has not submitted a copy of the January 24, 1992 chapter 11 that was rescinded by the March 11, 1996 Handbook, nor has it submitted copies of any prior regulations it promulgated governing "staff adjustments." *See* IAF, Tabs 4, 8-9, 16, 25-26. If the agency has had the authority to maintain its own non-Title 5 RIF system for over 50 years, as it claims, we would expect the agency to have produced more than just recent, incomplete excerpts from its personnel rules.

Further, our review of relevant judicial precedent discloses not consistency but, at best, ambiguity regarding the agency's administrative interpretation of section 7421(a). In a civil action filed by an agency Physician who had been separated, the agency submitted an uncontradicted affidavit stating that the Physician was separated "because there was an excess of surgeons on the Cardiothoracic section of the [Surgical] Service and not as a disciplinary action." *Balderman v. Veterans Administration,* 666 F. Supp. 461, 465-66 (W.D.N.Y.

1987), *aff'd in part and vacated in part on other grounds*, 870 F.2d 57 (2d Cir. 1989). The district court found that "VA Manual MP-5, Part II, Chapter 11, [paragraph] 5 clearly states that 'retention principles contained in sections 3501 through 3504, title 5, U.S.C.' ... apply insofar as they are consistent with the language of paragraph 5" to the agency's determination to separate the Physician. *Balderman*, 666 F. Supp. at 466. The court also found that "the provisions of 5 U.S.C. §§ 3501-04 ... require" that OPM prescribe RIF regulations applicable to the agency for the release of competing employees, such as the Physician, in the event of a RIF. *Id.* The court granted summary judgment to the agency upon determining that the agency properly reached the Physician for release from his competitive level under OPM's applicable RIF regulations and the agency's regulations.[3] *Id.* The agency has not proffered any explanation to the Board in this appeal for the apparent prior inconsistent, or, at best, ambiguous position it took before the court in *Balderman* that, at least by its regulations, it would apply 5 U.S.C. §§ 3501-04 to an employee appointed under 38 U.S.C. § 7401(1) who has been separated for reasons consistent with those applicable to RIF actions.

As explained in the preceding section, the plain language of the Veterans' Preference Act of 1944 indicates that Congress intended the RIF rules to cover all executive branch employees. If, in creating the VHA two years later, Congress had intended to exempt VHA health-care professionals from those rules, it would have done so in explicit terms. The statutory phrase "conditions of employment" is not explained in the legislative history examined by the courts or that the

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[3] The U.S. Court of Appeals for the Second Circuit vacated and remanded the district court's dismissal of this action because there were genuine issues of material fact as to whether the Physician would have agreed to accept part-time status had he known that he would lose his tenure rights, and that the genuine issues of fact precluded the grant of summary judgment to the agency on the Physician's claim that his separation violated his tenure rights. *Balderman v. Veterans Administration*, 870 F.2d 57, 60-61 (2d Cir. 1989).

parties have cited to us, and when read in context the phrase appears only to relate to scheduling and tours of duty. We conclude that 38 U.S.C. § 7421(a) cannot reasonably be interpreted as exempting VHA health-care professionals from the RIF rules at 5 U.S.C. §§ 3501-3504 and 5 C.F.R. part 351.

B. The Title 5 RIF scheme is not inconsistent with other portions of Title 38 that govern VHA Health-care professionals, nor would subjecting VHA health-care professionals to the Title 5 RIF scheme derogate any Title 38 provisions.

Section 7425(b) of Title 38 states:

> Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this statute of this title or this chapter [chapter 74] shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified.

The agency argues that the Title 5 RIF scheme is inconsistent with Title 38 provisions governing VHA health-care professionals, and that subjecting VHA health-care professionals to the Title 5 RIF scheme would be in derogation of Title 38 provisions. We disagree.

Contrary to the implication of the agency's arguments, nothing in Title 38 expressly states that civil service laws are inapplicable to VHA health-care professionals employed under 38 U.S.C. § 7401. Section 7425(a), which was added by the Act of 1991, does contain a list of Title 5 provisions that are expressly *not* applicable to VHA health-care professionals appointed under section 7401(1), but all such Title 5 provisions relate to the Senior Executive Service. The provisions of subchapter I of chapter 35 of Title 5 governing RIFs, 5 U.S.C. §§ 3501-04, are not a part of that list.

Further, as stated above, section 7425(b) states that no other provision of Title 5 or any other law pertaining to the civil service system which is

inconsistent with any provision of chapter 74 of Title 38 shall be considered to supersede, override, or otherwise modify chapter 74 of Title 38 except to the extent that such provision of Title 5 or of such law specifically provides, by the specific reference to a provision of chapter 74 of Title 38 for such provision to be superseded, overridden, or otherwise modified. *See Cochran v. Department of Veterans Affairs*, 67 M.S.P.R. 167, 171 (1995). The Board has determined that health-care professionals appointed by the agency under 38 U.S.C. § 7401(1) are appointed without regard to civil service requirements regarding qualifications and thus are excluded from the competitive service and may appeal an adverse action under 5 U.S.C. chapter 75 to the Board only under limited circumstances. *See* 5 U.S.C. § 7511(b)(10); *Falso v. Office of Personnel Management*, 77 M.S.P.R. 207, 210-11 (1997); *Pichon v. Department of Veterans Affairs*, 67 M.S.P.R. 325, 326-27 (1995).

Thus, a case which arises out of "a question of professional conduct or competence of a section 7401(1) employee" and in which a "major adverse action"[4] is taken under 38 U.S.C. § 7462 requires review and execution by the Secretary, the highest ranking administrative officer of the agency. Under such circumstances and in view of the statutory language that the Secretary's action shall be the "final administrative action in the case," the Secretary's action would be entitled to due deference and not be subordinated to review by the Board absent an express grant of review authority. *See Cochran*, 67 M.S.P.R. at 173. However, it is undisputed in this case that the appellant's separation was taken by the agency due to a "staff adjustment" and does not arise out of a question of her

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[4] A "major adverse action" is defined as an adverse action involving a suspension, transfer, reduction in grade or basic pay, and discharge. 38 U.S.C. § 7461(c)(2). A "question of professional conduct or competence" is one involving "direct patient care" or "clinical competence." 38 U.S.C. § 7461(c)(3); *see Cochran*, 67 M.S.P.R. at 171 n.*.

"professional conduct or competence." *See* IAF, Tabs 1, 3-5, 8-9, 16; *see also Cochran*, 67 M.S.P.R. at 172 (quoting H.R. Rep. No. 466, 101st Cong., 2d Sess. at 30 (1990) that "the issue of whether a matter or question involves professional conduct or competence is not subject to review by any other agency"). Thus, the Board's jurisdiction over this appeal is not foreclosed by section 7462.

"Other adverse actions" taken under 38 U.S.C. § 7463, that are *not* major adverse actions or do not arise out of questions of professional conduct or competence, are subject only to a grievance procedure wherein the employee has a right to "formal review by an impartial examiner within" the agency and a review of the examiner's findings and recommendations "by an official of a higher level than the official who decided upon the action." 38 U.S.C. § 7463(d). There is no statutory requirement that a section 7463 disciplinary action be reviewed or executed by the Secretary, let alone that the action constitute the "final" administrative action in the case. Thus, the Board has found that a section 7463 disciplinary action need not be accorded the deference given to a section 7462 action and may be reviewed by the Board in an individual right of action (IRA) appeal "consistent with" 5 U.S.C. § 1221. *Cochran*, 67 M.S.P.R. at 173-74; *see Falso*, 77 M.S.P.R. at 211.

Accordingly, the Board held in *Cochran* that it may exercise jurisdiction over an IRA appeal filed by an employee appointed under 38 U.S.C. § 7401(1) and who was issued a letter of admonishment and subsequently removed for "preemployment suitability" within the provisions of section 7463, consistent with the disciplinary scheme established by Congress for section 7401(1) employees who are subject to a disciplinary action that is grievable under section 7463. *See* 5 U.S.C. § 2302(a)(A)(2)(iii) ("personnel action" means "an action under chapter 75 of this title or other disciplinary or corrective action"); *Cochran*, 67 M.S.P.R. at 168-69, 174; *see also Falso*, 77 M.S.P.R. at 211.

Similarly to *Cochran*, we find for the reasons below that the Board has jurisdiction over this appeal by an employee appointed under section 7401(1) who has been separated for reasons consistent with those applicable to RIF actions, and that our exercise of jurisdiction here is consistent with the disciplinary scheme established by Congress for section 7401(1) employees who are subject to a disciplinary action that is taken under 38 U.S.C. chapter 74.

The Court of Appeals for the Federal Circuit has held that a RIF is an administrative procedure by which agencies eliminate jobs and account for employees who occupy abolished positions. *Huber v. Merit Systems Protection Board*, 793 F.2d 284, 286 (Fed. Cir. 1986); *see Marcoux v. U.S. Postal Service*, 63 M.S.P.R. 373, 376 (1994). The court has noted further that a RIF action is not an adverse action against a particular employee, but is directed solely at a position within an agency. *Huber*, 793 F.2d at 286; *Marcoux*, 63 M.S.P.R. at 376. As noted above, it is undisputed in the record as currently developed that the appellant's separation does not arise out of a question of her professional conduct or competence, but was directed at eliminating her position due to a "staff adjustment ... necessitated by a reduction in the projected level of resources available to support the [agency's] Coatesville Center activities." IAF, Tab 3, subtab D. These circumstances alone indicate strongly that the appellant's separation is a RIF action.

We acknowledge that 38 U.S.C. § 7306 directs the Secretary to make appointments in the VHA. We also acknowledge that section 7421 authorizes the Secretary to "prescribe by regulation the hours and conditions of employment and leaves of absence" of employees, such as the appellant, who are appointed in positions under 38 U.S.C. § 7401(1). We do not dispute or attempt here to review the Secretary's exercise of his authority to make appointments or to prescribe the hours, leave and work conditions of employees appointed under section 7401(1). However, we find nothing in the above Title 38 provisions, or in the legislative

history of section 7421 and the judicial precedent that has construed that section, that conflicts with the agency's obligations and the appellant's rights under the RIF statutes and regulations. "The RIF statutes and regulations ... are not directed toward an agency's authority to establish or eliminate positions; rather, they address the manner in which employees shall be released *after* the agency decides to eliminate positions." *Hargrove*, 77 M.S.P.R. at 271 (the Board held that the statute allowing the Department of Defense to appoint civilian employees to teach children of military personnel at military installations "without regard to the provisions of any other law relating to the number, classification, or compensation of employees," 10 U.S.C. § 2164(e)(2), could not be construed to allow the agency discretion to disregard the statutory provisions relating to RIF proceedings); *see* 5 U.S.C. §§ 3501-04; 5 C.F.R. §§ 351.202(a)(2), 351.901.

Further, our exercise of RIF jurisdiction here is not foreclosed by 38 U.S.C. § 7462 and is "not inconsistent" with the disciplinary scheme established by Congress for section 7401(1) employees who are subject to a disciplinary action that is grievable under section 7463. *See Cochran*, 67 M.S.P.R. at 173-74. Because we find that our jurisdiction over this appeal derives from OPM RIF regulations, 5 U.S.C. § 7511(b)(10), limiting the adverse action appeal rights under 5 U.S.C. chapter 75 of employees appointed under 38 U.S.C. § 7401(1), does not affect our jurisdiction over this case.

CONCLUSION

In summary, we find that the RIF provisions of 5 U.S.C. §§ 3501-04 and 5 C.F.R. part 351 are clear and apply to VHA health-care professionals. Therefore, we hold that the Board has jurisdiction over this appeal of a RIF separation filed by an employee appointed under section 7401(1).

ORDER

Accordingly, we return this appeal to the Northeastern Regional Office for further processing and adjudication consistent with this Opinion and Order. This

is the final order of the Merit Systems Protection Board in this interlocutory appeal. 5 C.F.R. § 1201.91.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.